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Supreme Court, U.S.
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No....

in the

SUPREME COURT
of the
UNITED STATES OF AMERCIA

March Term 1987
no.

DOUGLAS J. MICHELSON,
petitioner,

vs.

Merrill Lynch Pierce Fenner & Smith,Inc.
respondent,

P E T I T I O N FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

D.J. MICHELSON
MICHELSON METALS
1503 CENTRAL NW.
ALBUQ. NEW MEXICO
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f o r p e t i t i o n e r

41 0 P

QUESTIONS PRESENTED

(1.)May summary judgment be granted against a plaintiff despite genuine issues of material fact, because the court chooses to accept only the evidence of the Plaintiff on his adhesion contract?

(2.) Is there error where the court discharges plaintiff's attorney over his objection, only days before a scheduled jury trial,and then scapgoats him for proceeding on with the matter, by denying him due process, joiner of the correct parties, and awarding a levy in the form of attorney fees against him?

(3.) Is there a private right of action under the Commodities Exchange Act?

(4.)Can the Court of Appeals dismiss an appeal on lower court errors, where appealant advises he is unable to finish the whole appeal in a clearly contrived five days allowed from the time appealant would receive the order and the brief would be due?

(5.) May summary judgment be granted in clear disregard of the rules that all of the matters be tried and where fact logic suporting those left standing makes impossible the findings?

(6.)Is a judgment void where it infringes constitutional rights of the person to due process, an attorney, and a jury trial?

(7.)Where parties are joined to effect execution, must the court then hear all cross claims interposed

against those parties?

(8.) Is it necessary on a judgment on controverted fact to consider the facts behind the claimed insecurity, where no performance ensues?

(9.) Was splitting the suit into two parts improper?

(10.) Was equity properly considered in not staying execution against the defendant, after court created spliting, and matters were still being litigated in the continuation suit?

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JURISDICTIONAL STATEMENT

Douglas J. Michelson ,petitioner, respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on December 23,1986 and those previous to it. That order issued in summary fashion conflicts with the decision of other circuits and the holdings of this court on similar issues. The procedures did not provide a proper review of lower court error and therefore may not have fullfilled the statuatory right of review from lower court error and abuse.

The evidence at the lower court level of a corner in the silver

market, was at best ignored. Great effort was made to disallow effort directed at it. And the distortions and other abuse heaped on appealant by the magistrate did not comport with the parties rights to full and meaningful discovery to provide the evidence in a proper form. There was no transcript or effort at judging the parties contentions, through such time tested methods as observing the witnesses under oath.

PARTIES BELOW

The parties to the proceeding are Merrill Lynch Peirce Fenner & Smith, inc.plaintiff. Douglas J. Michelson, defendant. First National Bank in Albuquerque, added as cross claimant. First Interstate Bank in Albuquerque added as party by Merrill Lynch.

OPINIONS BELOW

The opinion of the District court is not published. It is printed in the appendix at pages "B"

The opinion of the Appealate Court is unpublished. The opinion of the Court of Appeals is attached in the appendix to this petition. This case is covered in three opinions all of which make up the substance of this petition. They are printed in the appendix at pages "A". see full table of contents on appendix.

JURISDICITON

The judgment of the Court of Appeals was entered on December 23,1986. The jurisdiction of this Court is invoked under 28 USC 1254. The opinion of the court of appeals

for the 10th circuit does not conform to the Supreme Court holding.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional provision involved are Constitutional Amendment number seven involving petitioner right to a jury trail. Constitutional Amendment number fourteen and six as it involves the right to an attorney, and fourteen as it involves due process throughout the proceedings, especially in fairly and timely enforcing and communicating with petitioner to process his suit. Constitutional Amendment number five as it involves the property rights of the defendant. And Constitutional Amendment four.

The statutory provisions involved are the Commodity Exchange Act (7 USC 1 et seq.) especially sections 4, 9 and 13 of the CEA.(7 USC 6, 7 USC 13)

Also the provions under the Antitrust Laws (15 USC 1 et seq.);especially (15 USC 1) as would apply to a corner in the silver market;(15 USC 2) monopolization of the market; (15 USC 4) (15 USC 7) (15 USC 15) as they apply to enforcement of the statutes.

The Federal Rules of Civil procedure are involved as they apply to the proper processing of a "civil suit"; especially as to proper parties and the intent of one form of action.

The Federal Rules of Evidence are involved in improperly excluded evidence.

The New Mexico Common law on contracts and various statutory provisions applicable to affirmative defenses given in the answer.

STATEMENT OF THE CASE

This is a commercial claim arising from the corner in the silver market 1979-80.

PETITIONER, APPEALANT in the Court of Appeals, and DEFENDANT in the lower court operated his business as an individual proprietorship. He was sued by his broker Merrill Lynch for a deficiency in his account remaining after his broker alledgedly liquidated contracts used to hedge in his small metal business. He was forced out at the height of the silver bubble, in opposition to his wishes and financial ability,and after acquience of Merrill Lynch to their call. There was little commercial reality to the liquidation since no performance through the

delivery of metal was ever done. Those accomodating Merrill Lynch in the trade took no position, put up no margin, had no equity interest, or effected no delivery of metal in place of Michelson. A few days after the alledged liquidation, the exchange corrects the excess price through a "liquidation only" order. It is controverted that Merrill Lynch was aware of the correction taking place when he liquidated Michelson. The market returns to it pre-corner price. The Congress of the United States Of America unleashes massive investigations of the market corner.

The mercantile issues, which all seem to have been dismissed in the counterclaims, are essentially the same as those this court has clearly

ruled were not properly dismissed. Nearest,is this courts holding in ---Poller v. CBS,inc. 368 US 464 . On most grounds complained of here, it is clearly the same issue and very much alike in many important features. One of those is it is a regulated area of commerce as was Poller (supra).

Merrill Lynch Pierce Fenner and Smith,inc (hereinafter Merrill Lynch) is one of the largest brokers in the commodity business. Dealers, especially small ones are virtually powerless in acquiesing to the contract demands made upon entry or participation. All must deal through these brokers.

Merrill Lynch imposed these upon Michelson. They claim thereunder to have virtually unlimited rights to

alter conditions, or change demands, effecting the conditions around the basic contract right with little regard to need and in deregation of what would be violative of normal commercial practice. re; acceleration, insecurity, or uncionsionability. Here they have used this contract right to default performance by the clearing house under the "exchange contract". The clearing house is less than an arms length devise utilized in commodity exchange markets to "guarantee performance" between agreed parties.

Up until the Supreme Court ruling in ---Merrill Lynch v. Curran 456 US 353, 72 Led2d 182, the position Merrill Lynch took was one of "no private right of action". This same

stance was taken herein and improperly omitted from the lower courts ruling,after this court clarified it in Curran (supra). Now they imply again, that "no private rights" are to be afforded under the Commodity Exchange Act or the Antitrust Law as the Commodity Account Agreement contractual priviledge is to be taken to be conclusive against acts violative of both the Antitrust Laws as well as the Commodity Exchange Act. This is clearly not the case. Yet the lower court acts as if it is.

Dismissing (all) of the counterclaims without prejudice and acknowledging numerous suits and a class action in New York is the lower courts sole concession to pages of pleading material,and evidence

obtained through other measures, directed at pointing out to the court that there was a corner in the silver market. It is impossible to believe that Judge Bratton had no idea that this kind of predation was afoot. Further, in his (first) opinion he found controverted material fact, which he proceed to ignore. He was required to proceed to a jury trial on it. He would not compel discovery of Merrill Lynch after his dismisal of defendant's attorney, even upon so relevant a matter as "what other suits had Merrill Lynch been sued on for fraud or cornering the silver market.". Which would have show the the extent of the cases of fraud and cornering out at that time. Later it was discovered (without court process)

that as early as October of 1979, class actions suits for cornering the silver market had been filed against Merrill Lynch, the HUNTS and others. The court was in error in not providing this kind of discovery through court process. It catered to the miscarriage of justice in what it denied or would not enforce or wait for.

The Judge ignored an expert opinion that the artifical price question and issues surrounding price in the silver market, impinged upon each of the counts and issues therein and should not be summary judged in this case. This was clearly material facts which made summary judgment impossible. And it was uncontroverted by Merrill Lynch.

The contradiction to good law and practice did not stop with the incursion on the jury right. The lower court in discharging plaintiff's attorney only days before the calendared jury trial, committed error in Constitutional law. After that,the rights of defendant to join the right parties, as most recently defined by this court in Merrill Lynch v. Curran, (supra) are also bypassed by the ruling that there would be no amended counterclaim and that the exchanges and other parties to the corner would not be joined in the matter.

Petitioner, in August of 1982 appealed the ruling disallowing amendment and joiner of the right parties in the counterclaim to the court of appeals which ruled it

interloucutory and sent it back down.

Merrill Lynch had moved for a default judgment on grounds,that would be so unfair as to shock the conscience of the court. By implication of their case law they were claiming use of the judical shield. It was not granted. Yet later the dismissal of the 4b claims,is claimed by Merrill Lynch in res judicata, to be sanctions for and under the default judgment. They turn a magistrate ruling that Michelson should pay Merrill Lynch fourteen hundred dollars for requiring responses to motions, into thirty three thousand dollars awarded for attorney fees. These were wrong by law and excessive by a reasonable standard of what the court pays attorneys.

Merrill Lynch simultaneously files a motion to again summary judge. It is vigorously opposed. It improperly proceeded on no new evidence or considerations, after a summary judgment finding controverted fact.

After the summary judgment ruling, the Court of Appeals again side stepped hearing the issue of whether a proper hearing was had for a Commodities Exchange Act manipulation case, by a procedural ruling leaving appealant five days to write the brief,knowing that it could not be done in that time. It then dismissed for what it termed lack of prosecution, while hearing the appeal taken by Merrill Lynch to affirm. And then the Appeal court denied a

rehearing. The record of motions made for time extensions clearly shows petitioner would have completed the brief within a short time, had the appeal court wanted to rule other than on procedural grounds. It of course should not have affirmed had it gone to the merits or conformed to 'stare decisis' in other particuliars.

Michelson moved the lower court under rule 60 b to void the judgment on grounds of fraud clearly shown. Uncontroverted evidence in the form of a New York District Judge's opinion was submited. Judge Lasker's preliminary opinion was that in the silver market in a related case the price mirage was tantamount to fraud. Additionally uncontroverted evidence was submitted showing that the

constitutional violations of no jury trial, improper removal of an attorney, and due process, made the summary judgment void, and therefore uneforceable under the execution Merrill Lynch requested. Merrill Lynch was continuing their harassment by obtaining a writ of execution under the summary judgment and proceeding to inflict further damage upon Michelson in his relations and business, in a situation which in equity called for it to be resolved at one time. Given the continuation suit the court acknowledged litigation was not at an end. The court should have acted to preserve the status quo. The court instead ruled that the constitutional rights of defendant were not violated , there was no fraud, and that no stay

of execution would be given to prevent manifest injustice.

Additionally, the court dismissed a cross claim against a party after that party was joined in the matter, failing to hear defendants cross claim, yet hearing and acting upon plaintiff's cross claim. Michelson was not allowed to join proper parties for a decision on the merits , yet Merrill Lynch joins who it pleases. This dismissal of the cross claim was wrong. There was no evidence contradicting that submitted with the complaint. It was not on the merits and clearly violated further due process. Hearing plaintiff's cross claims and not defendants cross claims arising from the same acts and situation is not due process. It does

not comport to the Federal Rules as to one form of action nor the equitable principals of limiting litigation by requiring that all claims be included.

Defendant, Michelson again appealed. Was the judgment void under execution for the reasons stated? Should the appealate court remand it for a hearing on the merits? Michelson ask the appeal court to stay the ongoing execution and make the court hear the case properly, including the new claims against joined parties. Merrill Lynch ask again for summary affirmance under procedural rules to deny defendant his right to have the errors reviewed and become or relegate themselves to precedent in the 10th circuit.

It is from that December 23,1986 10th circuit judgment to summary affirm,petitioner appeals. It encompasses the previous lower court summary judgment, and the appeal court's summary affirmance and dismissal of appeal which petitioner contends must have been heard on the merits, but was not.

REASONS FOR GRANTING THE REQUEST

(1.)The Supreme Court must enforce its holding in ---Poller vs. CBS,inc 368 US 464 that summary judgment was not appropriate in this type of commmercial litigation.

Allowing summary judgment wrongly

extends the contractual agreement required of all smaller dealers, to a position of negating the antitrust law in the exchange market. This is clearly not the law as most recently held in ---Strobl. v New York Mercantile Exchange 768 f2d 22,cch 22647, and this court review of treble damages therein.

(2.)The granting of summary judgment in this case negates the effect and intention for the treatment of a proper manipualtion case, as only recently held by this court in ---Merrill Lynch v. Curran 456 US 353, 72 led2d 182.

The lower court disallowed joiner of an exchange in a proper manipulation case in direct conflict with this courts ruling.

(3.)The lower court errored in its review on private right of action.

The lower court did not cite and follow this courts holdings properly in the ruling on "a private right of action" in a commodities case under the Commodity Exchange Act.---Curran (supra)

The effect of judgment is to again create "no private right of action" based on the Commodity Account Agreement,which everyone must sign. This court should not allow the lower court to rule opposite the expressly provided intention just given in ---Curran (supra) that there was a private right of action under various parts of the CEA.

(4.)The appeal court negated its purpose in not reviewing lower court

error in law and abuse.

The appeal court in making a procedural ruling which did effect the substantial rights of the party should have allowed the requested time to complete the appeal, and should have afforded review of each complained of error. The extensive revised docketing statement shows the appeal court that there were a number of areas on which review can be demanded. Its failure to allow briefing of points, left it without knowledge other than this document as to what it should review, and it did not show it review the problems recited in the docketing statement.

The summary affirmance for cross appealant was wrong. Where an unpublished opinion of a controversial

subject, over the objection of appealant to hear his appeal, enforces a lower court summary judgment in questionable circumstances, there is a high likelihood of abuse.

Where facts show that defendant in the lower court has had most of his working capital in his business taken, had his life and livilihood disrupted, and complains of losing his legal rights there is no grounds for a summary procedure as was used here.

Where evidence is shown which is highly reliable that there were problems in the silver market and that does not appear in the opinion, there is reason to review.

The lack of review of case law, cites of authority and other trapings of justice, makes the review procedure

open to question and abuse. By this method of appealate review, reflection of all the reasons for and inherent in law and appeal are lost. Judges in the lower courts may become tyrants who are not subject to review, nor do they need conform to precedent. They only need curry favor among those on the appealate bench to have their cases affirmed. And there will be little attention paid to citizens Constitutional rights, especially those for a jury trial.

(5.)The lower court seriously infrienged the provience of the jury in moving from finding the existence of material facts, and a case seriously controverted, to judging it as if there were no jury demand, and no opposition..

The lower court in failing to provide a jury trial after finding controverted material fact errored.---US v. Jepson Dc NY 1950, 90 fsupp 383.

The lower courts failure to rule on a motion in limine to take judical notice of the Congressional Hearings on the problems in the Silver market is error. Had the lower court reviewed it, its conclusions would have been opposite or clearly different. As it is there is gross neglect in failing to rule twice on a motion asking judicial notice. And error in ignoring a market that was manipulated.

The lower court in failing to properly account for and review defendant's expert opinion that price

was a key issue in the various counts and that the circumstances surrounding the price were in need of extensive review, was lack of fair consideration of material facts. Merrill Lynch submitted no expert opinion on price,so the effect is conclusive on "price facts".

The lower court after ordering a pre-trial order could only conclude from Merrill Lynch's briefing to the court, that the issues enumerated by petitioner were almost to a one controverted. Thus the lower court failed at this critical time to take proper consideration of admissions by Merrill Lynch that the issues and facts which made up the issues in the pre-trial order, were material and controverted.

The lower court errored or exagerated certain phrases which leave the impression of lack of diligent prosecution in controverting or challenging the evidence as it was made. This was simply not the case in the record.

The lower court errored and appeal court failed to reveiw, if the "recently found evidence" which was sworn to by a Merrill Lynch person, was on personal knowledge of the transaction, or was that person even employeed at the time. Both facts were challenged. This goes to the inherent problems of summary judgment from lawyer drawn affidavits.

(6.) The lower court did not fairly or properly consider the circumstances, in his opinion on fraud

(4b) charges.

It does not look at the basis for the action, which was an artifical price. This is especially true with regard to the claimed insecurity of plaintiff. The review of the actions is pretty illogical considering the uncontroverted facts on price which were put in the record by defendant's expert. In order to have issued correct margin calls, they had to be based on correct prices. Merrill Lynch issued theirs based on artifical prices. And that was the basis of fraud.

It is also true for the backdating of margin calls, to make them appear due earlier than otherwise. The need for acceleration is argued in the continuation suit as

being in violation of New Mexico state law.

Those claims going forward show that all is not resolved herein. It was a partial judgment on controverted material fact relative to fraud, which should not have been summary judged.

(7.) The spliting of the suit into various parts was unfairly done and imposes an unfair burden on defendant to go forward in a distant district. It mascarades to allow the improperly judged part,to bypass the jury, and gain a life of its own in resjudicata. The continuation suit filed when proper parties would not be joined herein,and transfered to New York for consoldiated processing with other related silver suits, should not be subject to an improper summary

judgment striking claims on the basis of resjudicata. The court should remand for trial on all the issues.

CONCLUSION

The over use of summary procedure has left its mark on petitioner by taking his business and livlihood worth several million dollars without so much as a hearing. Petitioner claims and the record shows,that his attorney was removed by the court over his objection. And then his jury trial was canceled. The lower court cannot be said to have reviewed the evidence and facts or circumstances giving rise to this suit. It does not seem to have

been provided where critical motions directed to evidence are not even ruled upon. Or where discovery request are not complied with and when compeled denied for the wrong reasons. And most assuredly,when you have findings under the imprimatur of the CONGRESS of the UNITED STATES OF AMERICA,and mountains of documents, and hearing depositions,and other key evidence from the overseeing regulator, yet it all goes unmentioned. There you have a case which lacked proper process.

It is not often that this court gets to see the abuse of the lower court against such a controversial and questionable background. Or to recognize how the system then through its attorneys refuses further process.

It likes to cover up too.

The lack of appealate review which could have corrected some of the problems is apparent. Instead they chose to not hear the errors, or may have felt it did what it could in denying the request of Merrill Lynch to make it all res judicata.

This court can correct the wrong, as it has in the past in Poller and other cases, so that proper hearings and meaningful discovery is provided, to allow the court to reach a properly adjudicated decision.

respectfully submited,

D.J.Michelson

as of March 20,1987
Albuquerque, New Mexico

May 5,1986